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Supreme Court of the United States

OCTOBER TERM, 1928

No. 429

W. D. MANLEY,
APPELLANT,

Versus

THE STATE OF GEORGIA,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF ON BEHALF OF THE STATE OF GEORGIA

IT IS SETTLED THAT A STATE STATUTE COMES TO THE SUPREME COURT OF THE UNITED STATES WITH THE CONSTRUCTION WHICH THE STATE COURT HAS PUT UPON IT—THE STATUTE WILL BE TREATED AS MEANING WHAT THE STATE COURT CONSTRUES IT TO MEAN AND AS CONTAINING ALL THE ELEMENTS WHICH THE STATE

COURT HOLDS THAT IT CONTAINS, EVEN THOUGH THE STATE COURT'S CONSTRUCTION MAY DIFFER FROM THE CONSTRUCTION WHICH THE SUPREME COURT OF THE UNITED STATES WOULD GIVE IT.

In the case of Gatewood vs. North Carolina, 203 U. S. 531, where a statute had been construed by the Supreme Court of North Carolina, it was, upon an appeal to the United States Supreme Court, held that the construction given the statute by the Supreme Court of North Carolina would be taken as a part of the statute for all purposes of testing its constitutionality, the court using the following language:

> "In the argument it is insisted that the construction given by the supreme court of North Carolina to the statute is wrong, since, in effect, it reads out the provisions of section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the 14th Amendment.
>
> "But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the state under that view."

In the case of Board of Education vs. Illinois, 203 U. S. 553, the constitutionality of a statute of Illinois as construed by the supreme court of that state was under review, and this court, in the opinion, used the following language:

> "The construction of the act by the supreme court we must accept as determining the meaning of the act. In other words, we must regard the act as if the legislature had, in explicit language, excluded from its provisions foreign corporations. If this renders the act void, plaintiff in error, whether its argument be tenable or untenable,

seems to be put in the dilemma urged by the defendant in error, and an affirmance of the judgment is required."

In the case of Smiley vs. Kansas, 196 U. S. 447, the validity of a state statute was under review, and the construction of it by the state court was before this court. This court, in the opinion, used the following language:

> "It is well settled that, in cases of this kind, the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court (citing authorities). Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from that we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in" certain cases which were quoted by the court.

The court then proceeded further on to say:

> "We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the state. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined."

AS CONSTRUED BY THE SUPREME COURT OF GEORGIA, THE PENAL STATUTE UNDER INVESTIGATION MEANS THAT EVERY INSOLVENCY OF A STATE BANK SHALL BE PRESUMED TO HAVE RESULTED FROM THE FRAUDULENT OR ILLEGAL MANAGEMENT OF ITS PRESIDENT AND BOARD OF DIRECTORS, AND EACH OF THEM IS SUBJECT TO INDICTMENT; THAT THIS IS ONLY A PRIMA

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The statute in controversy, the same being section 28 of Article 20 of the Georgia Banking Laws on page 219 of Acts of 1919, and being in language identical with section 204 of the Georgia Penal Code, reads as follows:

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

This act has been construed by the Supreme Court of Georgia in four cases, to-wit: Griffin vs. State, 142 Ga. 636; Fordham vs. State, 148 Ga. 758; Snead vs. State, 165 Ga. 44; and in the present case of Manley vs. State, reported in 144 S. E. pg. 170, and a copy of the opinion being in the record in this case.

It will be observed that the act says every insolvency of a bank shall be deemed fraudulent.

The supreme court has held this word "deemed" to mean only "presumed" and that there is only a prima facie presumption that the insolvency is fraudulent.

The supreme court has held that the acts or omissions of the president and directors which are punished are their fraudulent acts causing the insolvency, or their illegal acts causing the insolvency in connection with the management of the bank.

The supreme court has also construed the proviso, which says that the defendant may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered and generally with the same care and diligence that agents receiving commission for their service are bound to observe, and have held also that the defendant may show any other act, such as a panic, or a run on the bank, or some other unforeseen misfortune other than the fraud or illegal act of the defendant to have been the cause of the insolvency. In other words, the statute is, by the decisions of the supreme court of Georgia, reduced right down to the proposition that the fraudulent or illegal conduct of the defendants in the management of the bank must have produced its insolvency, and that if anything other than this produced the insolvency, the defendants should be acquitted.

The proviso, in providing that the presumption of fraud may be rebutted by showing the affairs of the bank to have been fairly and legally administered and generally with the same care of agents, &c., is a provision only for rebutting the presumption of fraud. When the kind of fair and legal management specified is shown, then unless the state should introduce some other evidence of fraud or illegality than the presumption, the defendants would be acquitted. If the state relied only on the presumption then evidence of fair and legal management and proper care in managing the bank's affairs would rebut the presumption of fraud, but of course, as the statute is punishing fraudulent or illegal conduct, it is left open to the state to prove that fraud or illegality as the cause of the insolvency, and the proof of that fraud or illegal conduct, of course, could not be repelled, as could the prima facie presumption, by showing fair and legal administration of the bank, unless the proof of that fair and legal administration was strong enough to overcome the state's proof of fraud or illegal conduct. In other words, it would have to be an inconsistent set of facts with the state's evidence, and, in that event, it would not only be a reply to the presumption of fraud, but if, as just stated, it disproved the facts relied on by the state showing fraud or illegality, it would be a complete defense. Fraud or illegal acts on the one hand causing the insolvency, and an entire fair and legal and faithful management of the bank on the other side, could not co-exist, and, necessarily, the proof of one excludes the other.

Under the decisions of the Georgia Supreme Court hereinafter quoted, the matter is clearly and simply this: that if the defendant's fraudulent or illegal acts should cause the insolvency of a bank, he is guilty under this statute. The Supreme Court of Georgia evolved this construction out of the act by considering both the enacting clause and the proviso. In the main body of the act, it is provided that every insolvency of a

bank shall be deemed fraudulent. Thus the acts of the defendants for which they are to be punished must be fraudulent and must cause the insolvency of the bank. In the proviso to the act, it is said that the presumption of fraud may be repelled by showing that the affairs of the bank had been fairly and legally administered. The court arrived at the construction that if there was any illegality in the administration of the officers producing the insolvency, that under the proviso that was brought within the act.

To fraudulently and illegally administer a bank is the antithesis of fairly and legally administering it, as provided in the proviso.

We will now examine the Georgia cases construing this enactment.

In the case of Griffin vs. State, 142 Ga. 636, the court, on page 641, used the following language:

> "Properly construed, the section does not authorize the punishment of the president and directors 'even though they had nothing to do with the management of the bank and though the insolvency was not brought about by their conduct, or with their knowledge.' The affirmative declaration that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe, and that upon such showing 'the jury shall acquit the prisoner,' does not exclude the president or a director of a chartered bank which has become insolvent from disproving, by any legitimate evidence, the presumption of fraudulent mismanagement which may have been raised against him. The fact that in this State the defendant can not testify, but may make his statement not under oath,

which the jury may believe in preference to the sworn evidence, does not render the act invalid, as held in the cases of Vance v. State, and Wilson v. State, supra.

"We think that a fair and reasonable construction of the section of the Penal Code under consideration is, that, upon proof of certain specified facts, a presumption of fraudulent mismanagement would be raised against the president and directors of an insolvent chartered bank; that if such management as is mentioned in the proviso should be shown, the jury would be required to acquit the prisoner or prisoners; but that this would not prevent the accused from rebutting the presumption by proof of other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent, for which the accused was in no way responsible, or by other evidence rebutting the presumption of fraudulent conduct on his part."

In the case of Fordham vs. State, 148 Ga. 758, headnote 4, dealing mainly with the question of presumption, reads as follows:

"4. Section 204 of the Penal Code of 1910, which declares that 'Every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank-bills passing at par value, shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years: Provided, that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner,' is not violative of the 14th amendment to the constitution of the United States on the ground that it denies to persons indicted thereunder due process of law or equal protection of the law. Griffin vs. State, 142

Ga. 636 (83 S. E. 540, L. R. A. 1915C, 716, Ann. Cas. 1916C, 80).

"(a) The decision of McFarland vs. American Sugar Refining Co., 241 U. S. 79 (36 Sup. Ct. 498, 60 L. ed. 899), dealt with a statute which was construed differently from the construction placed upon Penal Code section 204 by this court in Griffin vs. State, supra; and while, on the construction placed upon the different statutes, the results were not the same, there was no conflict of principle in the rulings in the two cases.

"(b) There was no error in overruling the demurrer to the indictment."

In the case of Snead vs. State, 165 Ga. page 44, the question was before the Supreme Court of Georgia again upon this identical statute and as to its construction and constitutionality, and on pages 51, 52 and 53, the court used the following language:

"4. In the seventh and eighth grounds of the demurrer is raised the contention that under the terms of art. 1, sec. 1, par. 3, of the constitution the provision in the act that 'the defendant may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are bound by law to observe,' provides a defense so uncertain and indefinite that it can not avail the accused, and therefore that this provision is in violation of the foregoing constitutional provision. In the eighth ground it is said, that, independently of the constitutional provision referred to in the seventh ground, the defense provided is too uncertain and indefinite in its terms to be of avail to the defendant, and sets forth a measure of defense so general and indefinite as to make the question of criminality dependent upon the idiosyncrasies of the men who may happen to constitute the jury, and is of such nature that honest and intelligent men are unable to ascertain what

particular acts it seeks to condemn, and is therefore null and void because contrary to and in violation of law. We shall deal with these exceptions together. Does the language of the section quoted in the demurrer deprive the defendant of anything? We think not. The case is argued as if the one accused of a violation of the law now under consideration is restricted to the provision now under consideration as his whole defense. This is not so. It points one accused of crime to a circumstance or condition which the law guarantees shall entitle him to an acquittal, but it does not preclude him from any other defense properly appertaining to his case or any which may be suggested by the ingenuity of the party or his counsel. It does not preclude him from showing that he was not really the party in charge of the affairs of the bank, nor from showing that the insolvency of the bank was caused by robbery, burglary, embezzlement, or some other offense of which the defendant on trial was absolutely innocent. It does not deny him the right of showing that the insolvency accrued before his connection with the bank, and therefore that no act of his could have been the cause of this condition. This provision can not be said to deprive one charged with a violation of the law in question of any defense. It merely suggests with liberality a defense additional to those referred to and many others which might be suggested according to the facts of the particular case. Our attention has been called to a recent case in the Supreme Court of the United States (Cline v. Frink, . . . U. S. . . . 47 Sup. Ct. 681), in which it is ruled, as it frequently has been ruled before, that any criminal statute which is so indefinite and uncertain as that the decision as to criminality of the act must depend upon the idiosyncrasies of the men who compose the jury is void. We deem it a well-settled principle that a law which charges a crime is void if the construction of that law depends upon personal opinion, whether it be the opinion of those in the jury-box or out of it. But we do not think that the law with which we are here concerned falls within this inhibition. The attack in these grounds of the demurrer relates to a defense merely

> suggested, not required to be made; and the fact that the language used may be indefinite is to the advantage of the defendant, and not to his detriment. Observation and experience have convinced the writer that in the trial of most criminal cases a general defense under the general plea of not guilty is often far more easy to maintain than a defense upon specific points directed with merciless precision to the scrutiny of the court and jury. It must be remembered that, as said by Mr. Justice Lumpkin in the Griffin case, supra, 'The affirmative declaration that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, . . . does not exclude the president or a director of a chartered bank which has become insolvent from disproving, by any legitimate evidence, the presumption of fraudulent mismanagement which may have been raised against him'."

Thus we see that the court by no means limits the defense to cases of fair and legal administration, or cases where ordinary diligence, such as an agent should exercise, was exercised, as contained in the proviso to this act. It is therefore utterly immaterial whether the words "fairly administered" are certain or uncertain. It is immaterial whether the words "ordinary diligence" are too uncertain to be made the basis of a criminal enactment. They are only thrown in as additional or special defenses pointed out, and the construction of the Supreme Court upon this entire act is that anything is a defense which shows that the defendant did not, by his fraudulent or illegal conduct, cause the insolvency of the bank. It is useless to consume time with discussing whether the words "fairly" or "ordinary diligence" are exact enough expressions to be contained in criminal statutes, because by clear language the Supreme Court has held that this language "relates to a defense merely suggested, not required to be made; and the fact that the language used may be indefinite is to the advantage of the defendant, and not to his detriment," and that the defendants are not precluded from

defending against the charge of fraudulent mismanagement "by any legitimate evidence."

In the case at bar, as reported in 144 S. E. pg. 170, the court, on page 178, said:

> "Are the terms of the above section of article 20 of the Banking Act of 1919, sufficiently plain and explicit as to inform persons of ordinary intelligence what conduct on their part will render them liable to its penalty? Under this statute, proof of the insolvency of a bank raises the presumption that such insolvency is fraudulent. This is perfectly plain. It then provides that the defendant in a case arising under this section may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe, and upon such showing the jury shall acquit him. These terms are not uncertain and indefinite. The affairs of a bank are fairly administered when honestly administered. A person of ordinary intelligence, intrusted with the management of the affairs of a bank, knows when he is fairly and honestly administering these affairs. The affairs of a bank are legally administered when administered in accordance with law. Our statutes make certain acts in the administration of the affairs of banks unlawful. Presidents and directors of banks are chargeable with knowledge of these statutes, and they should acquaint themselves with their terms and requirements. The statute under consideration requires these officers to administer the affairs of the bank in their charge in accordance with these laws. This is perfectly plan. This presumption places upon these officers the burden of showing that they administered the affairs of the bank with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. This care and diligence is defined by law. It is 'that ordinary care, skill, and diligence required of a bailee for hire.'

Civil Code, section 3581. All these terms and requirements of the statute are plain and definite; and, when a defendant who is charged with a violation of this statute shows that he complied with these requirements, the jury is required to acquit him. In addition, this statute, as construed by this court, permits the accused to rebut the presumption against him, arising from proof of the insolvency of the bank, by showing other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent for which the accused was in no way responsible, or by any other facts rebutting the presumption of fraudulent conduct on his part. Griffin vs. State, supra. The statute by clear and explicit terms fixes standards by which both the guilt and innocence of a defendant can be determined. It follows that this statute does not violate the due process clauses of the State and Federal Constitutions, for the reason that its terms are so indefinite and uncertain as not to inform one accused of its infraction with what he has to meet on his trial."

The foregoing language of the Supreme Court of Georgia again clearly shows that the things made criminal are fraudulent or illegal acts causing insolvency on the part of these officers. The court, in referring to the proviso and in construing the word "fairly", said: "The affairs of a bank are fairly administered when honestly administered." In this sense, the word "fairly" in the proviso is merely used as the antithesis of the word "fraudulent" in the enacting part of the statute.

The court therefore gives effect to both the words fair and legal administration in the proviso as being the opposite of the word "fraudulent" in the main body of the act, and fraudulent acts mean dishonest acts and illegal acts causing insolvency of the bank.

The court, in the quotation above made, reiterates that, in

addition to the defenses named in the statute, the accused could show "other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent, for which the accused was in no way responsible, or by any other facts rebutting the presumption of fraudulent conduct on his part."

WE MAINTAIN THAT FOR A STATUTE TO MAKE IT A CRIME FOR THE PRESIDENT OF A BANK, BY HIS FRAUDULENT OR ILLEGAL ACTS, TO CAUSE THE BANK TO BECOME INSOLVENT,—IS NOT TO OFFEND THE DUE PROCESS OF LAW CLAUSE OF THE FEDERAL CONSTITUTION. THE WORD "FRAUD" IS OF PLAIN SIGNIFICATION, ESPECIALLY WHEN USED IN CONNECTION WITH THE MANAGEMENT OF A BANK BY ITS OFFICERS.

The Supreme Court of Georgia, in the following extract from its decision as found on page 178 of 144 S. E. Reporter, and in the cases quoted, shows a full grasp of the question:

> "A statute which makes an act penal in terms so vague that men of common intelligence must guess at its meaning, and differ as to its application, violates the first essential of due process of law. The term of a penal statute creating a new offense must be sufficiently explicit as to inform those who are subject to it what acts or conduct on their part will render them liable to its penalty. This is a well-recognized requirement under ordinary notions of fair play and the settled rules of law. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417; International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. ed. 1284; Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. ed. 1510; Fox v. Washington, 236 U. S. 273, 35 S. Ct. 383, 59 L. ed. 573; American Seeding Machine Co. v. Kentucky, 236 U. S.

660, 35 S. Ct. 456, 59 L. ed. 773; Miller v. Strahl, 239 U. S. 426, 36 S. Ct. 147, 60 L. ed. 364; Tedrow v. Lewis, 255 U. S. 98, 41 S. Ct. 303, 65 L. ed. 524; Kinnane v. Detroit Creamery Co., 255 U. S. 102, 41 S. Ct. 304, 65 L. ed. 531; Weeds, Inc. v. United States, 255 U. S. 109, 41 S. Ct. 306, 65 L. ed. 537; Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. ed. 322. When a criminal statute employs language having a technical or other special meaning well enough known to enable those within its reach to correctly apply it, it does not fall within the condemnation of the above principle. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 45 S. Ct. 141, 69 L. ed. 402; Omaechevarria v. Idaho, 246 U. S. 343, 348, 38 S. Ct. 323, 62, L. ed. 763. So when a statute employs words with a well-settled common-law meaning, although it may contain an element of degree in the definition as to which estimates may differ, it is not void for uncertainty. Nash v. United States, 229 U. S. 373, 376, 33 S. Ct. 780, 57 L. ed. 1232."

Instances of statutes more general and indeterminate than the one in question, which have been sustained and are being daily enforced, are numerous.

The Federal statutes for using the mails to defraud, as contained in section 338 of the United States Code Annotated, Title 18, under the head of Criminal Code and Criminal Procedure, provides:

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" shall mail a letter, &c., is guilty of a crime.

There is no conceivable difference between the statute just quoted and the case at bar. The word "fraud" is used in both cases and in the same general sense.

What could apparently be more general than the language of this Federal statute making criminal the obtaining of money or property by fraudulent pretenses, representations or promises, or what could be more general than to devise a scheme to defraud?

This statute has been upheld and enforced in cases too numerous to mention.

To show the full extent to which the Federal statute just quoted has been followed, we will quote the following cases: United States vs. Dexter, 154 Fed. 890, holding that the statute means the formation of a plan, device or trick to perpetrate a fraud on another; United States vs. Jones, 10 Fed. 469, holding that the statute covers any scheme, the necessary result of which would be the defrauding of somebody; United States vs. Loring, 98 Fed. 881, holding that a scheme may not be unlawful and yet may be within this statute, if its purpose is to defraud other persons; Oesting vs. United States, 234 Fed. 304 (in which certiorari was denied in 242 U. S. 647), holding that under this statute it is sufficient if a scheme appears reasonably calculated to deceive persons of ordinary comprehension; Rimmerman vs. United States, 186 Fed. 307 (certiorari denied 223 U. S. 721), in which it was held the crime was sufficiently shown if the scheme as charged is reasonably adapted to defraud; Harrison vs. United States, 200 Fed. 662, holding that the scheme to defraud may be found in any plan to get money by deceiving persons as to the substantial identity of the thing which they are to receive; Miller vs. United States, 133 Fed. 337, holding that the statute covers even the intentional use of a legal contract which is used to defraud another. We simply quote these cases as showing the practical effect which has been given to this general expression "defraud".

Another Federal statute found in section 83 of Title 18 of United States Code Annotated provides that

> "Whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be" punished, &c.

Here, the thing denounced as a crime is "to defraud the government" by obtaining the payment "of any false or fraudulent claim". What is defrauding is not defined. It is left to the general definition of the term as it is in the Georgia statute. What is a false and fraudulent claim is left to the general description furnished by those words.

In section 88 of Title 18 of United States Code Annotated is the following:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act" &c., such persons are guilty of a crime.

Thus, we see that it is generally enacted that to defraud the United States is a crime. As to the proposition contained in section 88, we find a reference only to one reported case, in which it was objected that the certainty required in the definition of an offense was not accomplished by section 88, which simply makes it a crime to defraud the United States, this being the case of Crawford vs. United States, 30 App. D. C. pg. 1. It was there held that the certainty required in the definition of an offense may be accomplished by the use of

words or terms of settled meaning, or which indicate offenses well known and defined by the common law; and that this had been accomplished in the section just quoted by the use of the terms "conspiracy" and "defraud".

The offense of being a common cheat and swindler is described in the Georgia statute very much as it is at common law, in the following language, the same being section 719 of the Georgia Penal Code:

> "Any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor."

Here, it is left to the court and jury to decide whether the particular means used are deceitful or artful and whether the result reached is the defrauding of somebody.

In the case of Waters-Pierce Oil Co. vs. Texas, 212 U. S. pg. 86, a statute of Texas was under review, which denounced contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, &c., and (quoting the language of the decision) "in the act of 1903, acts are prohibited which 'tend to accomplish' the prohibited results."

As to this, the court say, on page 109 of the decision:

> "It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that criminal statutes should be so definite as to enable those included in its terms to know in advance whether an act is criminal or not. Among others, Tozer

v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, is cited, in which the opinion was by Mr. Justice Brewer, then judge of the circuit court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. To the same effect is (citing cases.)" "And also the case of Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L. R. A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for, under such an act, it rests with the jury to say whether a rate is reasonable, and makes guilt depend not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

"Take the Act of 1903, which denounces acts which 'trend' to bring about the prohibited results. It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. In United States v. E. C. Knight Co., 156 U. S. 1, . . . this court said: 'Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.' This language was quoted with approval in Addyston Pipe & Steel Co. v. United States, 175 U. S. 237."

Further on in the same opinion, the court say, as to the words reasonably calculated to fix the price of commodities, &c.,

"As to the phrase, 'reasonably calculated,' what does it include less than acts which, when fairly considered, tend

to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?"

As to the contention that some of the cases quoted involved only civil contracts and that the case at bar involved a penalty, the court say further on page 111:

"It is true that the decisions quoted are in civil cases involving contracts and arrangements held invalid when attacked in proceedings in equity, and did not involve penalties such as were imposed in the case now under consideration.

"And it is to be remembered that we are dealing with an act of the legislature, sustained in courts of the state, with reference to its validity in view of the prohibitions of the Federal Constitution against deprivation by state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the state; the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged, that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

Thus, we see that a jury may be given a general standard of conduct by which to judge the defendant's acts, even in a criminal case, and we submit that it would be nothing novel to submit to the jury, as in the present case, whether the fraudulent or illegal acts of the defendant brought about the insolvency of this bank.

In the case of Nash vs. United States, 229 U. S. 373, which was a conviction in a criminal case on the Sherman Anti-trust

Act, the following, which was the language of that act, was under consideration by this court, the contention being that the statute was so vague as to be inoperative on its criminal side:

> "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction shall be punished" &c.

In answering this objection, the Supreme Court of the United States used the following language:

> "The two counts before us were demurred to on the grounds that the statute was so vague as to be inoperative on its criminal side; that neither of the counts alleged any overt act; that the contemplated acts and things would not have constituted an offense if they had been done, and that the same acts, etc., were too vaguely charged. The demurrer was overruled and this action of the court raises the important question of the case. We will deal with them before passing to matters of detail.
>
> "The objection to the criminal operation of the statute is thought to be warranted by Standard Oil Co. v. United States, 221 U. S. 1 . . . and United States v. American Tobacco Co., 221 U. S. 106. . . . Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act

cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919.

"But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' (citing cases) 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' (citing cases) If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. (quoting authorities) If he did no more than drive negligently through a street, he might get off with manslaughter or less. (citing authorities) And in the last case he might be held although he himself thought he was acting as a prudent man should. (citing authorities) But without further argument, the case is very nearly disposed of by Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, . . . where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Thus, we see that a criminal statute is sustained which deals merely with a combination "in restraint of trade." A jury has

to pass upon the question whether, upon all of the facts, first, a combination is shown; and, second, whether that combination restrains trade or commerce; and, thirdly, whether such combination, by reason of intent or the inherent nature of the contemplated acts, prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade. The latter propositions were construed to be the true meaning of the Sherman Act in the decisions of Standard Oil Co. v. United States, 221 U. S. pg. 1, and United States v. American Tobacco Co., 221 U. S. 106. Thus, the defendant would have to pass on the question as to whether his combination in restraint of trade was so great as to prejudice the public interests by unduly restricting competition. The line of demarcation between a combination which somewhat restricted competition, but which did not unduly restrict it to the prejudice of the public is a very nice distinction, yet the defendant would have to pass on it. It involved a question of degree. Surely, a case under the Sherman Act involves much more latitude than merely passing upon the question of whether the defendant's fraudulent acts produced the insolvency of a bank. The principle being once established that criminal statutes can submit questions of degree, and questions of classifying the nature of an act to a jury, the present case is disposed of. Surely, it would not be hard for a jury to classify an act as a fraudulent act as distinguished from an honest act.

We quote also, in connection with the decision in the Nash case, section 8820 of the Act of July 1890, as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty" &c.

In the case of Sears Roebuck vs. Federal Trade Commission, 258 Fed. 307, the declaration of section 5 of the act was claimed to be void, unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, were identifiable as acts of unfair trade then condemned by the common law. The Federal Court of Appeals, however, replied:

> "But the phrase is no more indefinite than 'due process of law.' The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression 'unfair methods of competition' is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon 'unsound mind,' 'undue influence,' 'unfaithfulness,' 'unfair use,' 'unfit for cultivation,' 'unreasonable rate,' 'unjust discrimination,' and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of 'rebates or concessions' or of 'schemes to defraud,' without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of 'dishonesty' and 'fraud' are so well, widely and uniformly understood that the general term 'rebates or concessions' and 'schemes to defraud' are sufficiently accurate measures of conduct."

Therefore, it was a question for the jury in the case at bar, under the well known meaning of the words fraud and fraudulent, to determine whether the defendant was guilty of any fraudulent conduct in connection with his management of this bank which contributed to its insolvency.

A splendid statement which contains the cream of the authorities on the subject of how far a statute can go in using general language to define an offense is contained in 16 Corpus Juris on page 67, and which reads as follows:

> "The legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result; or it may group together various means by which the end may be accomplished and make any one of such means an offense when done to attain the object denounced by the statute. In the absence of provision to the contrary, a statute may punish an offense by giving it a name known to the common law, without further defining it, and the common-law definition will be applied. In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty. The certainty required may be accomplished, as we have seen, by the use of words or terms of settled meaning, or words which indicate offenses well known to and defined by the common law. It is not necessary to use technical terms, and the legislature may designate the offense by using words in common and daily use; and a penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited."

REPLY TO ARGUMENT AND AUTHORITIES OF APPELLANT ON CONTENTION THAT STATUTE IS SO VAGUE AS TO OFFEND DUE PROCESS CLAUSE—NO CASE CITED HOLDING THAT THE WORD "FRAUDULENT," AS APPLIED TO THE MANAGEMENT OF A BANK'S AFFAIRS AND AS TO THE PRODUCING OF INSOLVENCY, IS LANGUAGE TOO VAGUE FOR A CONSTITUTIONAL CRIMINAL ENACTMENT.

Considerable argument is made in the brief of appellant as to the different views jurors might take of the word "fraudulent", the word "fairly", the words "legally administered", and the words "ordinary care". It is unnecessary to consider whether any of these words, save the word "fraudulent" is of uncertain meaning, because, as the Supreme Court has construed the statute, the defendant must be convicted of fraudulently or illegally acting and in a way to produce the insolvency of the bank. The court has also held that the defendant may show any fact as a complete defense which disproves the state's charge as to his fraudulent or illegal act.

Appellant cites Collins vs. Kentucky, 234 U. S. 634; United States vs. Pennsylvania R. R. Co., 242 U. S. 208; United States vs. Cohen Grocery Co., 255 U. S. 581, and other cases holding statutes to be too vague for enforcement. None of them use language anywhere similar to that used in the case at bar.

We have quoted many statutes of recognized validity using language practically the same as our case, and finally the Nash case, supra, holds that a mere question of degree to be determined by a jury may exist in a criminal statute without rendering it invalid.

It may well be said that the word "fraud" or "fraudulent" has a well defined meaning in law. Indeed, it might be well contended that it had a settled common law meaning, although we do not have to go to this extent in order to sustain this law.

Counsel for appellant state in their brief that there is no effort to define fraudulent banking, that there was no such crime at common law as fraudulent banking or as fraud, that the term "fraud" of course has a meaning at common law in civil matters, but it is claimed that it is too indefinite to be the basis of a criminal statute.

We have already quoted numerous criminal statutes containing the word "fraud". In Volume 2 of Bouvier's Law Dictionary, Edition of 1914, page 1307, we find the following:

> "Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence; Co. Litt. 3 b; Dy. 295; Hawk. Pl. Cr. c. 71.
>
> "In considering fraud in its criminal aspect, it is often difficult to determine whether facts in evidence constitute a fraud, or amount to a felony. It seems now to be agreed that if the property obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the possession only be parted with, and that possession be obtained by fraud, it will be felony; Bacon, Abr. Fraud; 2 Leach 1066; 2 East, Pl. Cr. c. 673.
>
> "Of those gross frauds or cheats which, as being 'levelled against the public justice of the kingdom,' are punishable by indictment or information at the common law; 2 East, Pl. Cr. c. 18, sec. 4, p. 821; the following are examples: Uttering a fictitious bank bill; Com. v. Boynton, 2

Mass. 77; selling unwholesome provisions; 4 Bla. Com. 162; mala praxis of a physician; 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations; Rex v. Bembridge, cited 2 East 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty, Cr. Law 666; fabrication of news tending to the public injury; Stark. Lib. 546; and per Scroggs, C. J., Rex v. Harris, Guildhall, 1680; cheats by means of false weights and measures; 2 East Pl. Cr. c. 18, section 3, p. 820; and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public; 2 East, Pl. Cr. c. 18, section 2, p. 818; as with the common cases of obtaining property by false pretences."

From the foregoing quotation, it would seem that fraud has a well defined meaning at common law, especially in the following language: "and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public," and "the common cases of obtaining property by false pretences."

THE FACT THAT THE STATUTE RAISES A PRESUMPTION THAT INSOLVENCY OF A BANK IS CAUSED BY THE FRAUD OR ILLEGAL ACT OF THE OFFICERS NAMED DOES NOT RENDER IT UNCONSTITUTIONAL. THERE IS A RATIONAL CONNECTION BETWEEN THE FACT FROM WHICH THE PRESUMPTION IS RAISED, TO-WIT, THE FACT THAT THE DEFENDANTS ARE THE MANAGING AND CONTROLLING OFFICERS OF THE BANK, AND THAT THE BANK BECOMES INSOLVENT, AND THE THING PRESUMED, WHICH IS THAT THE BANK BECAME INSOLVENT BECAUSE OF THE FRAUDULENT OR ILLEGAL MANAGEMENT OF

THOSE OFFICERS. IN A LARGE PERCENTAGE OF CASES, IT IS A MATTER OF PUBLIC KNOWLEDGE THAT THE WRONGFUL ACTS OF THE OFFICERS IN CHARGE HAVE CAUSED THE INSOLVENCY OF BANKS, AND IT IS ONLY SUFFICIENT THAT THE CONNECTION BETWEEN THE THING PRESUMED AND THE FACTS FROM WHICH IT SHOULD BE PRESUMED SHOULD BE REASONABLE, AND NOT THAT IT SHOULD BE THE FACT IN EVERY CASE, OR EVEN IN A MAJORITY OF CASES. THE PRESUMPTION IS ONLY PRIMA FACIE AND CAN BE REBUTTED.

In the case of Griffin vs. State of Georgia, 142 Ga. page 636, the Georgia Supreme Court used the following language:

"With certain limitations, the legislature may enact that when specified facts have been proved, they shall, even in a criminal case, be prima facie evidence of the guilt of the accused, and shift the burden of proof. On this power there are limitations, the principal one of which is that the fact or facts which will raise the presumption and shift the burden of proof must have some fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly unreasonable, unnatural, or extraordinary, but must bear some reasonable relation to the facts proved. To illustrate, if the legislature should declare that every man found wearing a straw hat in September should be presumed to have committed any forgery which took place in that month, such an act would be invalid, because there is no rational connection between forgery and wearing a straw hat, and the presumption would be purely arbitrary. But if the legislature should declare that one found in possession of stolen goods shortly after a larceny should be prima facie presumed to be the thief, and that the burden of rebutting the presumption should rest on him, this would

be valid, the presumption not being purely arbitrary but there being a reasonable connection between the possession of the stolen goods and the commission of the larceny. Moreover, the presumption so raised must not be final, but the accused must be allowed a fair opportunity to make his defense and show all of the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all of the evidence as well as the prima facie presumption, if the facts from which it arises have been proved to exist. Banks v. State, 124 Ga. 15 (52 S. E. 74, 2 L. R. A. (N. S.) 1007, and note); Vance v. State, 128 Ga. 661 (57 S. E. 889); Wilson v. State, 138 Ga. 489, 493 (75 S. E. 619); 2 Jones, Ev. section 196; Mobile &c. R. Co. v. Turnipseed, 219 U. S. 35 (31 Sup. Ct. 136, 55 L. ed. 78, 32 L. R. A. (N. S.) 226, 22 Ann. Cas. (1912A) 463, and note); State v. Thomas, 6 Ann. Cas. 744, 746, and note (144 Ala. 77, 40 So. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. R. 17); 3 Enc. Ev. 291; 14 Id. 110.

"The exercise of this power by the legislature in relation to chartered banks, so as to raise a prima facie presumption of fraud against the president and directors, upon proof of the insolvency of the bank, is not violative of the fourteenth amendment of the constitution of the United States on the ground that it deals with chartered banks and not with other corporations. Legitimate classification in such cases does not deprive persons within the class of the equal protection of the laws. If banks can not be legitimately classified without including all other corporations in the legislation applicable to them, then all the banking laws of the country, National and State, would have to be declared invalid.

"If the business of banking furnishes a legitimate basis for classification in many respects, is the presumption raised by Penal Code (1910) section 204 an arbitrary presumption, without legitimate basis. That section does not provide punishment for mere insolvency, but contemplates fraudulent insolvency of banks. The president and

directors have duties to discharge in regard to the management of the bank and its affairs. The causes which bring about the insolvency of a bank are much more within the knowledge of its managing officials than of persons not connected with it. To impose on the State, in a prosecution for a fraudulent insolvency, the onus of proving all of the transactions of the bank and the acts of its officials, would place upon it a heavy burden. It is much easier for the managing officials of the bank to show that the insolvency was not fraudulent, but arose from other causes. The facts are peculiarly accessible to them, if they properly discharge their duties. The suggestion that the president and directors frequently take little or no part in managing a bank can have but little weight. It is the duty of directors to direct, though they may commit certain ministerial duties to authorized officers. We have recently had occasion, in regard to trading corporations generally, to declare that while such directors may commit the active management of the business to authorized officers, this will not relieve them from the duty of reasonable supervision, and it was said: 'Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies.' McEwen v. Kelly, 140 Ga. 720 (79 S. E. 777). It is not meant that carelessness will necessarily import guilt; but duties rest upon the president and directors of a chartered bank, in regard to the management of its affairs, which furnish a legitimate basis for a legislative act raising a presumption that they have been guilty of fraudulent mismanagement when the bank becomes insolvent.

"Giving the statute a reasonable construction, the presumption was not intended to be conclusive. The argument that the expression 'shall be deemed fraudulent' meant that it should be finally adjudged fraudulent is unsound. The latter part of the section provides for repelling 'the presumption of fraud;' and the fair construction of the entire section is that the presumption raised is only prima facie, and subject to be rebutted."

Thus, we see that the Supreme Court of Georgia held, first, that the business of banking furnished a legitimate basis for classification; and, second, that the presumption was not arbitrary or unnatural but bore a reasonable relation to the facts to be proved.

The Georgia court gives good reasons for making banks an especial class to themselves, and for raising this presumption. Banks and their officers stand upon a different basis from other corporations. Banks receive the money of the public. All classes, from intelligent and experienced business men to helpless women and children, deposit their money in banks. Custodians of money should be unusually particular and cautious. The temptation to use the money in bank for one's personal benefit, in the way of speculation, investment or otherwise, is very great. The common experience of mankind and the usual numerous safeguards which our laws, federal and state, throw around the operation of banks, show that banks must be subject to more regulation and supervision than ordinary commercial corporations. The large number of bank failures which occur periodically, as a matter of common knowledge, seem to demonstrate that special and stringent rules must be made to cover banking.

We have said this much in favor of classifying banks as subjects for a peculiar legislation not ordinarily applying to other corporations.

When we come to the reason for the presumption against the officers of the bank, we must draw on common knowledge. A very large percentage of bank failures are caused by the peculations of those in charge. The president and directors are those in complete charge of the bank's affairs. All other officials are minor and hold under them. A bank may fail for

various reasons. There may be an unexpected panic, without rhyme or reason. There may be a period of great business depression suddenly coming upon the country, which causes the assets of the bank to be frozen, which would otherwise be liquid; or the failure might be caused by the peculations of some subordinate officer serving under the president and directors; or, again, the president and directors may have been guilty of fraudulent or illegal mismanagement which caused the insolvency. All these things are within the range of possibility and are easily conceivable as causes of the insolvency of a bank. The courts, in looking at this thing of reasonableness of a presumption, have always exercised a commonsense view of the matter, taking cognizance of those things which all men well informed know about. The question is, whether the thing presumed is rationally connected with the fact which gives rise to the presumption. Is there a fair relation between the two things?

The facts in this statute which give rise to the presumption are the control by the president and directors of the affairs of the bank. It is for the state legislature to decide, within reasonable limits it is true, as to whether the thing presumed occurs so often from the facts raising the presumption as to justify the raising of the presumption from those facts. It is for the legislature to judge of whether conduct of the kind in question becomes so common or general as a cause for the insolvency of banks as to authorize the raising of a presumption that, when that insolvency occurs, the fraudulent conduct of the men in charge has brought it about.

This is purely within the domain of state legislation. We might say that it depends upon the facts, practices, and known occurrences as to banks in the particular territory affected by the legislation. There may be something peculiar in the nature

or charter powers of banks in particular states which exposes them more to especial danger from misconduct of officers in charge than in other localities where banks are more carefully guarded. There may be something in the nature of the deposits or in the carelessness of the depositors which would open the bank to more temptation on the part of the officers. The history of the locality, the number of bank failures, the regarded or known causes of those bank failures—are all matters for the state to determine upon in raising a presumption.

We can at least say that there is a rational connection for the presumption against those who control the destinies of the bank. When a bank fails, the mind instantly goes to the query: Who were its officers? What was the trouble? What character of management had that bank had? The very first inquiry that investigators would make into the affairs of the bank would be as to the conduct of the officers. Were they guilty of negligence? Were they guilty of fraud? Were they merely careless or were they thieves? That the destiny of every bank is largely in the hands of its officers, all people know. The difference between a successful bank and one which fails is usually found in the personnel of its managers.

The case most largely relied upon by the other side as to presumption is the case of McFarland vs. American Sugar Refining Co., 241 U. S. 79, in which a presumption of participation in forbidden monopoly from the systematic payment by a person engaged in sugar refining in Louisiana of a less price for sugar than was paid in another state and a presumption of like participation in a monopoly from the keeping idle of a sugar refinery for more than one year,—were held unreasonable presumptions and the statute void. It needs no argument to show the distinction between that case and our case. Many things, manifestly, would have been legitimate cause for pay-

ing a less price for sugar in Louisiana than in other states, as was pointed out by the court. Many causes, such as antiquated machinery, &c., might cause a particular plant to be kept idle more than one year. The court, in that case, however, used the following language:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate'."

The Supreme Court of the United States, in Hawes vs. Georgia, 258 U. S. pg. 1, sustained a law of the State of Georgia in a criminal prosecution providing that the presence of distilling apparatus upon real estate occupied by a man raised a prima facie presumption that he was the distiller of intoxicating liquors. On page 4 of that decision, the court used the following language:

> "It has been decided, as counsel concede, that the legislature may make one fact prima facie evidence of another, and it is certainly within the established power of a state to prescribe the evidence which is to be received in the courts of its own government. Adams v. New York, 192 U. S. 585, 588, 48 L. ed. 575, 578, 24 Sup. Ct. Rep. 372.
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> "In Hawkins v. Bleakly, 243 U. S. 210, 214, 61 L. ed. 678, 683, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959, it is said: 'The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. Mobile, J. & K.

C. R. Co. v. Turnipseed, 219 U. S. 35, 42, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.'

"Undoubtedly there must be a relation between the two facts. Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; McFarland v. American Sugar Ref. Co., 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498. That is, if one may evidence the other, there must be connection between them,—a requirement that reasoning insists on, and, necessarily, the law.

"We think the condition is satisfied by the Georgia statute. Distilling spirits is not an ordinary incident of a farm, and, in a prohibition state, has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm, or one who occupies it, will know what there is upon it. It is not arbitrary for the state to act upon the presumption and erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him, with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the circumstances of his acquisition, for the circumstances were not so isolated or secret as not to have been known to others.

"We agree, therefore, with the supreme court of the state, that the existence upon land of distilling apparatus, consisting of the still itself, boxes, and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation.

"The principle and the presumption depending upon it were certainly not strained against Hawes. To the comment of the court we may add that the distilling apparatus was within 300 yards of his house. It is true that a pasture

intervened, it was testified, between it and his house, and then 'a hill with pines growing on it, and there was a descent down a hill to where the still was located,' though 'it could not have been seen from the house, but smoke arising from it could have been seen. There was across the pasture a path leading towards the still.' It was added, however, 'that the path might have been made by cattle or stock.' And a witness testified that the path was old."

The case just quoted is peculiarly applicable to the case at bar. The presumption raised was from the mere presence of distilling apparatus upon land occupied by the defendant. The statute provided that if any such apparatus were found or discovered on the premises, this was prima facie evidence that the person in actual possession had knowledge of the existence of the same. It was, of course, possible that a large land owner, or even a small one for that matter, might not know of the presence of a distilling apparatus. A man upon a farm of thousands of acres might have a dozen distilleries upon it, and know nothing of any of them. Yet the land was his. He could, by the use of a certain amount of diligence, have discovered the presence of the apparatus. It was held within the power of the state to raise the presumption against him because he might have known of the presence of the apparatus. The only burden put upon the defendant was that of proving why and how he did not know the distilling apparatus was there. As the court said: "An explanatory statement was open to him", &c.

Therefore, we say it is for the state to determine upon how much probability there is of the defendant's guilt from the existence of the facts raising the presumption. There must be some connection between the facts and the thing presumed, and it must not be an arbitrary one, and there is no other or further limitation than this.

It will be observed that in the Hawes case just quoted, the defendant had the presumption raised against him from the simple fact of occupying a status, a relation towards certain land. He was guilty of no active participation in any criminal act of any kind, merely occupying a relation to certain land as owner, and from occupying that relation, the presumption was raised against him.

In the Hawes case, as in all other cases, the mere fact that the statute raising the presumption of guilt makes it possible that an innocent man may be convicted, unless there is an explanation, is not sufficient to make the act unconstitutional. This is the case with all prima facie presumption.

We might also consider the familiar case that a person found in possession of goods recently stolen is presumed to be the thief. This is an ancient doctrine. The person presumed guilty in that case is presumed only from possession to be guilty. This case and the distilling apparatus case are very much in point here, because the officers, in a broad sense, are in possession of the bank. They occupy the relationship, so to speak, of possessors and trustees of that bank. Something happens to that bank while in their possession. The destiny of that bank is in their hands. What that bank does is presumed to be done because of their control, and is it not the most rational presumption, first, that a human agency caused the insolvency of the bank; and, secondly, that that human agency was the agency of the men actually controlling the bank; and, thirdly, could not the legislature go a step further and say that not only that human agency caused the insolvency of the bank or contributed to it, but that it was their fraudulent conduct which caused that insolvency, because if the bank were fairly and honestly run, the chances are that it never would have become insolvent; and

therefore it is brought within the domain of legislation as to a presumption of the cause.

It will be borne in mind that there must simply be a rational relation between the two facts. It is not required that upon a statistical review of the situation, there would be more cases of guilt than innocence upon showing the facts from which guilt is presumed. Courts do not go into any such calculation or statistical inquiry. The actual conclusion of guilt from the fact from which guilt is presumed may be only one case out of ten, and yet the legislature could raise it, if it has a rational connection. It will be thus seen that no court can go into an inquiry as to the proportion of cases of guilt. Therefore, the Georgia law easily meets the first requirement that there is a rational connection between the fact from which guilt is presumed and the guilt itself, to-wit: the close relationship of the defendant to the bank, the fact that he had the opportunity, by his fraudulent acts, to cause the bank's insolvency, and the fact that he was in control of the bank. And then the further requirement of the Bailey case that the presumption is not conclusive, and that the defendant can rebut it is also clearly apparent in the case at bar.

A statute, making possession of a United States license to sell intoxicating liquor presumptive of a sale of the liquor, is constitutional. State vs. Donato, 127 La. 393; 53 So. 662; State vs. Dowdy, 145 N. C. 432; 58 S. E. 1002.

And statutes dealing with the failures of banks have been sustained which practically settle the case at bar.

The legislature may provide by a criminal statute that a failure of a banker shall be prima facie evidence of his knowledge of insolvency at the earlier time of receiving a deposit.

State vs. Buck, 120 Mo. 479; 25 S. W. 573; State vs. Sattley, 131 Mo. 464; 33 S. W. 41; Robertson vs. People, 20 Col. 279; 38 Pac. 326.

Also statutes have been declared valid which provided that the failure of a banker within thirty days after receiving a deposit which is lost to the depositor shall be prima facie evidence of fraud. State vs. Beach, 147 Ind. 74; 43 N. E. 949; Meadowcroft vs. People, 163 Ill. 56; 45 N. E. 991; and, in the Beach case, just quoted, from Indiana, where the statute made it an offense to act fraudulently, an indictment merely using the language of the statute was held sufficient, without setting forth the facts constituting the fraud.

In the Beach case just quoted, it was held that the statute was not unconstitutional as depriving the accused of his presumption of innocence, he having an opportunity to present his defense.

In the Meadowcroft case just quoted, it was held also that the statute did not infringe the rights of due process of the law and trial by jury.

A statute which provided that leaving a hotel or boarding house or surreptitiously removing baggage therefrom without paying for the accommodation is prima facie evidence of intent to defraud, was held to be constitutional. See In re Milecke, 52 Washington 312; s. c. 21 L. R. A. N. S. 259.

A statute somewhat similar was held constitutional in State vs. Yardley, 95 Tenn. 546; 36 L. R. A. 656, and the statute was held not to impair the constitutional right of trial by an impartial jury.

A statute, providing that possession by a junk dealer of certain bottles or kegs without the owner's written consent shall be

presumptive evidence of the unlawful use, purchase and traffic of these bottles, was held constitutional in People vs. Cannon, 139 N. Y. 32; 34 N. E. 757; and a similar law was held valid in the Anselvich case, 186 Mass. 376; 71 N. E. 790.

DISSENTING OPINION IN THE COURT BELOW, TO WHICH ATTENTION IS CALLED IN APPELLANT'S BRIEF, IS ANALYZED, AND WE CONTEND SHOWS NO SOUND REASON FOR DECLARING THIS LAW UNCONSTITUTIONAL.

Justice Atkinson, in his dissenting opinion in the court below, agreed that there was no indefiniteness about the statute in question. After quoting various decisions from the Supreme Court of the United States, Justice Atkinson, on page 189 of 144 S. E., quoted the first clause of the act in question, which reads as follows:

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years."

And then added:

> "Standing alone, this clause is sufficiently definite to meet the requirements of the Constitution."

The dissenting opinion proceeded upon the theory that the presumption of fraudulent insolvency rendered the act unconstitutional, the minority claiming, as we construe their opinion, that the insolvency might occur from other causes. Justice Atkinson, on page 189 of 144 S. E., thought that the words "affairs" and "fairly" were indefinite, but he added:

> "But, as they are contained only in the proviso which states a rule of evidence, and do not modify or vary the definition of the offense as provided for in the first clause, the fact that they are indefinite does not affect the question."

We respectfully submit that the word "affairs" is not indefinite. Some word had to be used which showed the range of the statute and the kinds of transactions referred to as being criminal on the part of the officers. The defendant's conduct had to relate to the affairs of the bank, or else his fraud could not contribute to the insolvency. Fraud, outside of the bank's affairs, would be irrelevant.

The word "fairly" can not be said to be vague or indefinite, because, as the majority of the court said, it was used in the sense of being the antithesis of dishonestly and fraudulently acting.

Judge Atkinson, in the second division of his opinion, beginning on page 189 of 144 S. E., contended that the presumption of fraud arising out of section 28 of article 20 of the Act of 1919 did not now disclose such a relation between the act raising the presumption and the thing finally presumed as to be reasonable. He admitted that under the old law, which was section 204 of the Penal Code, where the general test of insolvency was a comparison of assets with liabilities, that the presumption was not arbitrary. See page 190 of the opinion. He contended that the decision in the Griffin case, 142 Ga. 636, was based upon the definition of insolvency, which was applied in that case, he contending that there was a reasonable relation between fraud and such insolvency as arises out of an insufficiency of assets to meet liabilities. He quotes a certain part of the decision in the Griffin case on page 190 of 144 S. E. Reporter, but that portion of the decision which he quotes makes no reference to

limiting the presumption to only cases of such insolvency as were then provided for. True, the court did say that the limitation on the power of a state to raise a presumption is that the facts which raise the presumption must have some fair relation to, or connection with, the main fact as to which the presumption is raised.

Judge Atkinson then goes ahead on page 191 to say that the Banking Act was amended by a new definition of insolvency, and that definition is that, first, a bank is insolvent when it can not meet its liabilities as they become due in the regular course of business; second, that it is insolvent when the cash value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, it is insolvent when its reserves fall under the amount herein required and it shall fail to make good such reserve within thirty days after being required by the Superintendent of Banks.

Judge Atkinson contends that, under this new definition as stated in the first clause, there is no such relation between insolvency and fraud as would authorize the statute to declare the insolvency presumptively fraudulent. In other words, he claims as follows:

> "Fraud can not be presumed from acts which the law expressly authorizes. The law expressly authorizes banks to incur debt by receiving money on deposit and lending it out, except the amount required to be kept in reserve as provided in section 27 of article 19 of the said Banking Act. The money received on deposit may be payable immediately on the check or draft of the depositor. The loans made by the bank to others may be payable at future dates. If a bank thus receiving deposits lends out all its money in regular course of business, except the amount required to be kept as its reserve, it could not pay all its depositors on demand if they should demand payment at

the same time. Yet in these circumstances the failure to pay all the depositors would amount to 'insolvency' under the first clause of the definition of insolvency as embraced in section 5 of article 1, and raise a presumption of fraud under section 28 of article 20, notwithstanding every loan made by the bank was perfectly good and would be paid in full at maturity. In transactions of the character mentioned, the bank would have been acting within its usual banking business and in the exercise of its powers as conferred by law, and there should be no reasonable relation between its acts, or so-called 'insolvency,' and fraud. The scheme of the act is to draw a presumption of fraud from proof of facts which the statute expressly authorizes. This is wholly unreasonable. Lawfulness of the acts in lending out deposits to the extent authorized is incompatible with 'reasonable relation' between inability to pay 'on demand' and fraud—the ultimate fact sought to be presumed."

We submit that this reasoning is not sound.

We have already shown that the fact from which guilt is to be presumed (the fraud here) need not be a fact which, statistically speaking, would occur one time out of five with guilt. Generally speaking, it should be a fact which has some relation to guilt, which may be a circumstance pointing to guilt, or which, in a percentage of cases of that kind, might point to the defendant as one of those likely to be guilty. The officers stand in such a relation to the management of the bank, and have such control over its destiny, that if the bank fails, they are likely to be guilty of causing it to fail. This likelihood may be one out of two, or one out of four, or one out of five. The law does not stop to consider that the chances should preponderate in favor of the likelihood; that is, it is not required that, statistically, it should be three out of five, rather than two out of five. It must simply bear a common sense relation to the ultimate fact presumed.

It is perfectly apparent that the fraud of the officers is just as apt to cause the kind of insolvency in clause one as in clause two or three. The officers control all of the acts of the bank, and they are as closely related to the causes which cause insolvency under clause one as under clause two. Insolvency under clause two is arrived at by comparison of assets with liabilities. The officers are responsible for those assets. They are responsible for those liabilities. Their conduct in acquiring those assets and incurring those liabilities may have been honest. If so, the insolvency is not due to their fraud, although due to their act, and they would be acquitted. But the insufficiency of the assets may be due to their fraud. The officers may have purloined those assets. The insufficiency of those assets may be due to fraud in knowingly lending to insolvent persons and getting some collateral benefit, or in knowingly and recklessly lending to insolvent persons. The amount of liabilities may be due to fraud in various ways, unnecessary to enumerate.

Why can not the insolvency which grows out of the failure to pay on demand be equally fraudulent? It is true the law only requires the bank to keep fifteen per cent of its deposits on hand, but it does not compel it to lend out eighty-five per cent of its assets to worthless people. There may be circumstances due to conditions in the community which would make the lending out of eighty-five per cent of the assets a very reckless act, which would likely break the bank. Furthermore, even if the bank does the lawful act of lending out eighty-five per cent of its assets, many of those loans may be fraudulent and worthless. In this very case, Manley, within thirty days before the bank failed, loaned out $90,000.00 of its assets to other insolvent banks in which he was interested, in an effort to save them. He was guilty of gross fraud towards the bank in question, because he never took any security from tottering banks, never

even took a note or other definite evidence of indebtedness, and any jury must have found this conduct fraudulent. Can it be said as to this kind of conduct that, simply because he had a right to lend out a certain percentage of the assets, it was not fraudulent? The law means to lend the assets out honestly. Now, how was this fraud related to the insolvency of the bank? Simply in this way. First, depositors, if knowledge had reached them that eighty-five per cent of the bank's assets has been loaned out to worthless debtors—that, itself, may have caused a run on the bank and rendered it untenable to pay those debts on demand with only the fifteen per cent remaining. In the second place, fraudulently lending that eighty-five per cent might stand very closely related to the failure of the bank to pay its debts on demand, in that if that eighty-five per cent had been well loaned to responsible persons, it could have been rediscounted and the run on the bank thus met, or, if not actually rediscounted, on such a showing of assets, the money could have been borrowed and the failure of the bank to pay its checks and drafts on demand averted. At least, a jury could certainly have so found.

In other words, it will not do to state that there could not be a fraudulent insolvency of the kind described in clause one as consisting of a failure simply to pay debts on demand. That condition could be easily brought about by fraud, and that is all that is required under this statute.

The president and directors stand as much related to a bank and as much in control of a bank having this kind of insolvency to occur as to one having the general insolvency under clause two. Because of this control and relation, and because of the extreme possibility, and even probability, that their fraud might cause this kind of insolvency, the presumption can well be raised.

THERE COULD BE NO VAGUENESS GROWING OUT OF THE WORD "ILLEGAL" AS APPLIED TO THE DEFENDANT'S ACTS CAUSING INSOLVENCY OF BANK. STATE HAS VARIOUS LAWS REGULATING BANK MANAGEMENT, AND VIOLATION OF ANY OF THESE LAWS CAUSING INSOLVENCY OF BANK COMES WITHIN STATUTE.

A mere reference to these laws renders this requirement certain and exact according to the maxim "Id certum est quod certum reddi potest".

In the brief of appellant, reference is made to numerous requirements by Georgia laws in the management of state banks. Many of them are made criminal and others, while laying down a positive rule of conduct, have no penalty attached to them. It could certainly not render this enactment vague because it makes the defendant criminally responsible for an insolvency caused by his illegal acts or omissions in the management of the bank. Persons who operate banks are engaged in a business attended with much peril to themselves. Certainly, one of the most obvious dangers to which they are subject is that of failing to comply with the law regulating the trust confided to them.

As the Supreme Court of Georgia said in this case (see page 178 of 144 S. E.),

> "The affairs of a bank are legally administered when administered in accordance with law. Our statutes make certain acts in the administration of the affairs of banks unlawful. Presidents and directors of banks are chargeable with knowledge of these statutes, and they should acquaint themselves with their terms and requirements. The statute under consideration requires these officers to administer the affairs of the bank in their charge in accordance with these laws."

DEMURRER TO INDICTMENT ONLY RAISES QUESTION OF VALIDITY OF GEORGIA STATUTE OF 1919. SUPREME COURT OF GEORGIA HELD UNDER GEORGIA REQUIREMENTS AS TO PLEADING THAT INDICTMENT WAS SUFFICIENT. SUFFICIENCY OF INDICTMENT AS STATING CASE UNDER STATUTE IN QUESTION DISCUSSED.

The indictment in this case conforms to the Georgia decisions under this particular fraudulent bank insolvency statute. The Supreme Court of Georgia in this case, beginning on page 178 of 144 S. E. Reporter, said:

> "It follows necessarily from what has been said that the indictment is not subject to demurrer upon the ground that said section of said act is void for the reason that its terms are so general and indefinite as to make the question of criminality depend upon the idiosyncracies of the men who happen to constitute the court and jury, and do not enable honest and intelligent men to ascertain what particular act or acts it seeks to condemn."

In the brief of appellant, it is said that the indictment furnishes no information as to what particular acts of illegality or what particular acts of fraud were relied on by the state.

All this was passed on by the court below under the Georgia requirements as to pleading, the Supreme Court of Georgia using the following language on page 179 of 144 S. E., to-wit:

> "Said section of the Banking Act of 1919 is not violative of article 1 (section 1) par. 5, of the Constitution of this state, which provides that every person charged with an offense shall be furnished on demand with a copy of the accusation, in that the indictment does not name the act or acts which are prohibited by law, and is inadequate to inform the defendant of the nature of the accusation against

> him. The indictment need not allege the acts which caused the insolvency of the bank; and it need not specify the illegal acts upon which the state relies to show that the defendant did not administer the affairs of the bank in a legal manner."

In the State of Georgia, the common law forms of pleading in criminal cases are entirely abolished. The effort is to keep pace with modern times in making criminal pleadings as simple as possible. Penal Code of Georgia section 954 provides:

> "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury."

It needs no argument to show that the indictment in this case conforms to the Code section. It gives the name of the bank; it shows the connection of the defendant with the bank; it shows the insolvency of the bank and the date thereof; it alleges that the same was fraudulent, and it alleges that the same occurred during the defendant's official relation to the bank and while he was charged with the fair and legal administration of its affairs, and alleges that this was contrary to law.

The benefit of the presumption which this statute raises against the defendant will be entirely lost if the state had to know and charge in advance every illegal and fraudulent act of the defendant which contributed to the insolvency.

When the insolvency is shown, it is presumed that the officers named in charge of the bank were guilty of fraud causing the insolvency and the burden is on them to show their freedom from this fraud As hereinbefore discussed, they can show it in various ways, and the utmost liberality is allowed the defendant in making this proof.

The defendant, when he is indicted in a case of this sort, must necessarily know that the term of his connection with the bank is under investigation. If it be said that it is a hardship on him to keep track of all of his acts and omissions, it can be said that he voluntarily assumed his connection with the bank, knowing the strict requirements of the situation. As a practical matter, it would not be hard for any defendant, if innocent of wrong-doing, to show his innocence. The books and records of the bank are matters accessible, as is admitted in the brief of counsel for appellant. In any event, all these questions are for the state to decide. The state can reverse the burden of proof, if it wishes, in criminal cases. The state can abolish the doctrine that a reasonable doubt of guilt would require an acquittal.

The questions of burden of proof and presumptions of innocence, and the like, are entirely for the states to determine, and if all persons are put upon an equality in regard to these subjects, there is no violation of the due process of law clause.

In the case of Howard vs. Fleming, 191 U. S. 126, the court, in the body of the opinion, said:

> "Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is mean by the term 'reasonable doubt.' The supreme court (of North Carolina) sustained the charge. Of course, that is a decision of the highest court of the state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt, and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial

of any reference to the presumption of innocence cannot be regarded as a denial of due process of law."

In the case of Barrington vs. Missouri, 205 U. S. 483, it was held that compelling a defendant in a criminal case to testify against himself, and the admission of evidence in a criminal case which the highest court in a state decides did not violate the rights of the defendant under the state constitution and laws, did not raise any questions as to affording due process of law under the federal constitution.

It has been held that an erroneous ruling on a defective indictment does not present a federal question. Bergemann vs. Backer, 157 U. S. 655; Gibson vs. Mississippi, 162 U. S. 565; Remington Paper Co. vs. Watson, 173 U. S. 451.

Nor does the question as to whether an indictment charges a crime under the laws of a state present a federal question. Davis vs. Texas, 139 U. S. 652; Caldwell vs. Texas, 137 U. S. 692; O'Neal vs. Vermont, 144 U. S. 323.

In an indictment which charges the offense, such as this does, in the language of the Code, all things necessary to a conviction must be proved. Just as the Supreme Court held that this particular statute meant certain things, so this indictment means everything which the Supreme Court holds that the statute means. The proof would have to supply all that the Georgia courts hold must be proved under this statute. The charge of the court below would illustrate just how the law was applied to the defendant's case and what the scope of his defense was, but the charge is not a part of the record, and hence we can not quote from it.

The decision of the Supreme Court of Georgia, as it appears in the printed record, seems to be incomplete, and our quota-

tions have been from the full decision as it appears in the Southeastern Reporter.

THE BANKING LAWS MAKE CERTAIN ACTS ILLEGAL, AND WE WILL INSTANCE A FEW OF THEM UNDER THIS HEADING. SUCH ILLEGAL ACTS CONTRIBUTING TO THE INSOLVENCY OF THE BANK COME WITHIN THIS STATUTE. WE ARE CITING THE CASE OF BITTING VS. STATE, 165 GA. PAGE 55, WHICH SHOWS HOW THESE ILLEGAL ACTS ARE DEALT WITH IN THE CHARGE OF THE COURT.

We will not here cite all of the banking laws applicable to this case. The record in this case, as appears from the decision of the Supreme Court, we contend, shows that the defendant violated the banking laws in several particulars. One section of the banking law provides:

> "No officer, director, agent or employe of any bank shall use or borrow, directly or indirectly, for himself or for any firm or partnership of which he is a member, any money or other property belonging to any bank of which he is such officer, agent or employe, without the express authority and permission, previously obtained, of a majority of the directors or of the members of a committee of the board of directors authorized to act, which permission shall be evidenced by the written signatures of such directors, the borrower not voting or participating in any way in passing upon any loan or discount in which he may be interested."

Another law provides:

> "No bank shall lend any officer, director, agent or employe any amount whatever except upon good collateral or other ample security, and no such loan shall be made

until after it has been approved by a majority of the directors, or by the members of a committee of the board of directors authorized to act."

Another section of the banking law which is too long to quote in full provides: that no bank shall lend any one person, firm or corporation more than twenty per cent of its capital and unimpaired surplus; and further that no loan shall be made in excess of ten per cent of the capital and surplus, except on good collateral or other security approved by a majority of the directors or a committee of the board of directors authorized to act, which shall be evidenced by the written signatures of the directors or members of the committee, and that, in estimating such loans, all amounts loaned to firms and partnerships of which the person is a member shall be included. This act further provides for the buying or discounting of commercial paper owned by the person negotiating the same in addition to loans directly made to such person, and further provides that the limit of loans shall not apply to loans made on the security of agricultural, manufactured and industrial products having a market value, and for which there is a ready sale in the open market, and which is adequately secured by insurance against fire loss, in which event eighty per cent of the value of the commodities may be loaned, with various other conditions in relation thereto.

As also appears from the decision of the Supreme Court, Mr. Manley, the President, had withdrawn from the bank in question $90,000.00 within about thirty days before its failure, for which no note or security was given.

We will not call attention to the various other acts of the defendant enumerated in the opinion of the Supreme Court of Georgia, because the sufficiency of the evidence is not before this court.

In the case of Bitting vs. State, 165 Ga. page 55, we call attention to that portion of the decision on pages 77 and 78 as illustrating how the violations of law by a banker, and which contribute to the insolvency of the bank under the statute in question are dealt with in the charge of the court, that charge being as follows:

> "In ground 27a of the motion for a new trial complaint is made that the judge charged the jury: 'I want to read you certain sections of the banking law that will guide you in determining whether or not the affairs of the bank in question were legally administered. Section 7, page 67, of the banking law says: The board of directors, at the meeting at which report of examination shall be made to the board of directors, that is, the semi-annual examination, is read, shall, by resolution entered on the minutes, require that all debts due to the bank, which are past due for a period of one year, and which are not amply secured, shall be collected, placed in suit, or charged to profit and loss; that all past-due interest shall be collected upon any note upon which no interest has been paid within the last preceding twelve months, or that said note shall be collected, put in suit, or charged to profit and loss; and that all assets or claims in favor of the bank, which in the opinion of the directors are worthless or uncollectible, shall also be charged to profit and loss and not included in the list of assets of the bank. Said board shall at such meeting also require that all loans in excess of the amount herein authorized to be made shall be reduced at once, so as to bring them within the proper amount. A certified copy of the resolutions of the board acting on the matters brought to their attention in the report of the semi-annual examination shall be filed with the superintendent of banks within ten days after said meeting shall have been held.
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> "Section 13, page 70, of the banking law declares: No bank shall be allowed to lend to any one person, firm, or corporation more than twenty per cent. of its capital and unimpaired surplus. And no loan shall be made in excess

of ten per cent. of the capital and surplus, except upon good collateral or other ample security, and with the approval of a majority of the directors or of a committee of the board of directors authorized to act, which approval shall be evidenced by the written signatures of said directors or the members of said committee. Now that applies to a loan made subsequent to August 21st, 1922; prior to that time the law provided that no bank should be allowed to lend to any person, firm, or corporation more than thirty per cent, of its capital and unimpaired surplus and undivided profits; and the other provisions of the law prior to August 21st, 1922, were the same as in section 13 which I have just read to you; and the law as it stood prior to August 21, 1922, applies and regulates the making of loans prior to the passage of the act of August 21, 1922, that is, if you find that any loans were made prior to August 21st, 1922.

"Section 27, page 77, of the banking law provides: Every bank whose deposits are subject to check shall at all times maintain a reserve of fifteen per cent. of the amount of its demand deposits and five per cent. of the amount of its savings and time deposits. Savings banks and trust companies—the part with reference to savings banks and trust companies does not apply to the bank in question, and I will omit that. Such reserve shall consist of lawful money of the United States, gold certificates, Federal Reserve or National bank notes, in the office and vaults of the bank, and of moneys on deposit subject to call with other banks or bankers, such banks or bankers to be approved by the superintendent of banks; provided that the reserve against savings and time deposits may be invested in bonds of the United States or of this State at the market value thereof.

"The State insists in this case that the defendant on trial has violated those sections of the banking laws—those provisions of the banking law. The defendant denies that he

has violated any provision of the banking laws, but insists that if there was any violation of any banking law it was not intentional on his part. Now you would not be authorized to find the defendant guilty of a violation of any of these provisions of the banking laws which I have read you; the defendant is being tried on the charge made in the bill of indictment; but I have given you these provisions of the law that you may consider them in passing upon the guilt or innocence of the defendant of the crime charged against him in this indictment. Now in passing on this question as to whether or not the defendant has legally administered the affairs of the Bank of Commerce, you are the judges of that; you are to settle that question from the evidence in the case, taking into consideration along with the evidence the defendant's statement, as to whether or not the defendant in this case, either alone or in connection with other directors of the Bank of Commerce of Chattooga County, violated any of the provisions of the banking laws to which I have called your attention. In passing upon the question of whether or not the affairs of the bank involved in this case were legally administered, in so far as such administration was in the hands of the defendant, or under his supervision, control, or management, either alone or in connection with or in conjunction with other directors, you will consider the evidence and the defendant's statement as applying to the sections of the banking laws read to you, and which the State contends, and which the defendant denies, were intentionally and knowingly violated by the defendant. If the defendant intentionally and knowingly violated the provisions of the banking law to which I have called your attention, his act in such respect would be illegal; if not knowingly and intentionally done, or if done by or through mistake or error, or as the result of mismanagement, you will not consider such conduct, if any such has been proven, as in violation of the law.'

"The court did not err in instructing the jury as to the acts denounced in the Code as illegal. The jury were instructed as to other acts made penal in the conduct of a bank. We do not think that the court erred in giving these instructions."

Respectfully submitted,

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